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OCC v. Providian National Bank: Enforcement of the FTC's Unfair and Deceptive Trade Practices Statute by the OCC

I. INTRODUCTION

On June 28, 2000, Providian National Bank (Providian),¹ one of the nation's largest credit card issuers, settled charges of unfair and deceptive trade practices brought by the Office of the Comptroller of the Currency (OCC)² under the Federal Trade Commission Act (FTC Act).³ The OCC alleged that Providian misled customers in the marketing of its bank credit cards.⁴ Under the terms of the settlement, Providian agreed to pay at least \$300 million to consumers allegedly harmed by the bank's actions.⁵ According to Daniel P. Stipano, director of the OCC's enforcement and compliance division, that amount, which is still under negotiation,⁶ could increase if necessary to make harmed customers whole.⁷ In its complaint, the OCC alleged that

1. Providian National Bank, based in Tilton, NH, is held by Providian Financial Corporation, which is headquartered in San Francisco, CA. *Providian National Bank Settles OCC Charges of Unfair and Deceptive Credit Card Practices*, 69 LAW WEEK 2022 (July 11, 2000) [hereinafter *Providian National Bank Settles*]. Providian has more than \$26 billion of assets under its management. Laura Mandaro & Scott Silvestri, *Providian Expected To Pay \$300 Million in Predator Probe*, AM. BANKER, June 21, 2000, at 2.

2. Statement of John D. Hawke, Jr., Comptroller of the Currency (June 28, 2000) (on file with N.C. BANKING INST.) [hereinafter *Hawke Statement*].

3. A copy of the consent order is available from the OCC. The agreement came in the form of a cease-and-desist order reached under 12 U.S.C. § 1818 (1994). *Providian National Bank Settles*, *supra* note 1, at 2022. In addition to the settlement with the OCC, Providian entered into a settlement agreement with the San Francisco district attorney's office and the California attorney general's office. *Id.*

4. *Hawke Statement*, *supra* note 2.

5. *Id.* In addition to the approximately \$300 million under the terms of the settlement with the OCC, Providian agreed to pay \$5.5 million in civil fines to settle the charges brought by the San Francisco district attorney and the California attorney general for violation of California state laws. *Providian National Bank Settles*, *supra* note 1, at 2022.

6. *Hawke Statement*, *supra* note 2. See also *Providian National Bank Settles*, *supra* note 1, at 2022.

7. *Providian National Bank Settles*, *supra* note 1, at 2022.

Providian engaged in “predatory” behavior by misleading its customers when marketing its credit cards.⁸ According to Mr. Stipano, “the OCC believes that Providian has engaged in a pattern of abusing consumers by misleading them into accepting various credit card-related products that they do not want and in many cases do not need.”⁹

The settlement is significant on two levels. First, the estimated \$300 million settlement amount is, according to the OCC, the largest monetary award ever brokered by a bank regulatory agency.¹⁰ Second, and more significantly, the case marks the first time that a federal bank regulatory agency has brought an unfair and deceptive trade practices action against a bank under the FTC Act.¹¹ Section 5 of the FTC Act, on which the OCC’s cause of action was based, bars unfair and deceptive trade practices.¹² Banking law experts, however, are divided over whether OCC enforcement of the FTC Act is within the agency’s statutorily authorized powers.¹³ The OCC acknowledges that the move was groundbreaking, but insists that its action was well within its enforcement scope.¹⁴ OCC Chief Counsel Julie L. Williams claims the OCC has “the authority to take cease-and-desist actions with respect to laws that relate to bank operations.”¹⁵ Other industry lawyers, however, argue that because the Federal Reserve Board has never written regulations authorizing agency

8. Mandaro & Silvestri, *supra* note 1, at 2.

9. *Providian National Bank Settles*, *supra* note 1, at 2022. In addition to its settlement with the OCC and the authorities in California, Providian reached settlements in class action suits on December 28, 2000 from actions proceeding in the California Superior Court in San Francisco and the U.S. District Court for the Eastern District of Pennsylvania. R. Christian Bruce, *Credit Cards: Providian Reaches Settlement Pact on Suits Challenging Card Practices*, 76 Banking Rep. (BNA) 32, 32-3 (Jan. 8, 2001). The plaintiffs alleged that Providian had violated consumer protection laws through the bank’s credit card program. *Id.* at 33. The estimated total value of the settlements is \$105 million. *Id.* at 32.

10. *Providian National Bank Settles*, *supra* note 1.

11. Michele Heller, *Lawyers on OCC vs. Providian: We Object*, AM. BANKER, July 10, 2000, at 4.

12. 15 U.S.C. § 45 (1994).

13. Heller, *supra* note 11, at 4.

14. *Id.*

15. *Id.*; 12 U.S.C. § 1818(b)(1) (1994). This subsection provides that “the appropriate Federal banking agency” may issue cease-and-desist orders against banks for violation of “a law, rule, or regulation.” *Id.*

enforcement of the unfair and deceptive trade practices section under the FTC Act, the OCC cannot legally enforce that law.¹⁶

This Note discusses the *Providian* settlement and analyzes its implications. After providing background on the *Providian* case in Section II,¹⁷ the Note will discuss the judicial history of the enforcement of the FTC Act in Section III.¹⁸ It will then discuss, in Section IV, the issue of whether the OCC has the statutory authority to enforce the FTC Act against banks, a question left open by the settlement.¹⁹ Finally, this Note will consider, in Section V, the possible benefits and consequences of OCC enforcement actions against banks for unfair and deceptive trade practices.²⁰

II. BACKGROUND

The OCC's²¹ primary functions are to charter, regulate, and

16. Heller, *supra* note 11, at 4.

17. See *infra* notes 21-46 and accompanying text.

18. See *infra* notes 47-73 and accompanying text.

19. See *infra* notes 74-136 and accompanying text.

20. See *infra* notes 137-159 and accompanying text.

21. The OCC was established by the National Currency Act of 1863 as a bureau of the U.S. Department of the Treasury. *About the OCC*, at <http://www.occ.treas.gov/AboutOCC.htm> (last visited Jan. 27, 2001) [hereinafter *About the OCC*]. The National Bank Act later re-enacted the power of the OCC as administrator of the national banking system. *Id.* That act authorized the OCC to hire a staff to supervise and examine national banks. Office of the Comptroller of the Currency, 12 C.F.R. § 4.2 (2000). The agency currently supervises and regulates more than 2,600 national banks, which hold approximately fifty-eight percent of the total assets of all U.S. commercial banks. *About the OCC, supra*. The agency is headed by the Comptroller, who is appointed for a five-year term by the President, with the advice and consent of the Senate. Comptroller of the Currency, 12 C.F.R. § 4.3 (2000). In addition to managing the OCC, the Comptroller also serves as a director of the Federal Deposit and Insurance Corporation (FDIC) and as a director of the Neighborhood Reinvestment Corporation. *About the OCC, supra*. The OCC is headquartered in Washington, D.C., where the agency directs OCC policy, supervises OCC operations, and directly supervises certain national banks, including the largest national banks by the agency's Multinational Banking Department. Washington Office, 12 C.F.R. § 4.4 (2000). The agency has six domestic district offices and an office in London to supervise the international activities of national banks. District and Field Offices, 12 C.F.R. § 4.5 (2000). The OCC is funded by assessments on national banks, which pay for their examinations by the OCC and for the OCC's processing of their corporate applications. *About the OCC, supra*. The OCC also receives investment income from U.S. Treasury securities. *Id.*

supervise national banks.²² The Agency also has the power to take various forms of supervisory action against banks that do not comply with laws and regulations, or who otherwise engage in unsound banking practices.²³ Specifically, the OCC can issue civil monetary penalties, remove officers and directors, negotiate agreements to change banking practices, and issue cease-and-desist orders against national banks.²⁴

In the *Providian* case, the OCC claimed the bank engaged in numerous objectionable practices.²⁵ The Agency alleged that Providian used telemarketers to encourage consumers to transfer their credit card accounts to Providian by promising a lower interest rate than the consumer was currently paying.²⁶ The telemarketers, however, would allegedly refuse to disclose exactly how much the savings would be.²⁷ Even in cases where the customer persisted in asking specifically how much lower the rates would be, the OCC claimed that the telemarketers refused to provide the requested information.²⁸ According to the Agency,

22. 12 C.F.R. § 4.2. The OCC states that its mission is "to ensure a stable and competitive national banking system." *About the OCC*, *supra* note 21. It lists four objectives on which its activities are predicated: (1) to ensure the soundness and safety of the national banking system; (2) to foster competition between national banks by allowing banks to offer new services and products; (3) to improve the effectiveness and efficiency of OCC supervision, including reducing regulatory burden; (4) to ensure, for all Americans, fair and equal access to financial services. *Id.*

23. 12 U.S.C. § 1818 (1994).

24. *Id.*

25. Fact Sheet, Comptroller of the Currency, June 28, 2000, at 1 (on file with N.C. BANKING INST.) [hereinafter Fact Sheet].

26. *Id.* at 1-2. The telemarketers who marketed this program were instructed to use terms like "great savings" and "maximum savings." *Id.* at 1.

27. *Id.* Telemarketers were instructed to refuse to answer questions about the specific amount of savings. *Id.* Rather than answering such questions with specific numbers, the telemarketers used scripts that directed them to respond:

What we will do is beat what you are currently paying in interest. Basically, just show us the regular, non-introductory rates you're paying for the balances you've transferred, and we'll combine this information to get the actual cost you're paying in interest – and beat it! So, you'll have a lower overall rate!

Id.

28. *Id.* In instances where the consumer persisted in asking about the specifics of the savings, telemarketers were instructed to say, "[y]ou are in control. . . that is why this account can really save you money! Because your long-term rate is determined by the information you send us showing the regular non-introductory rates you're

Providian did offer savings in some cases, but only in amounts ranging from 0.3% to 0.7% rate reductions.²⁹

The OCC alleged that where customers agreed to transfer their accounts to Providian, the bank required the consumer to provide proof of the rate they were paying to their former credit card issuer.³⁰ The OCC claimed that in cases where the bank was not satisfied with a customer's proof of their old rate within the specified ninety-day period, Providian charged the customer the highest rate allowed under the credit agreement, which was 21.99% in some cases.³¹ The Agency also alleged that in cases where customers failed to prove their former credit card interest rate to the Providian's satisfaction, the bank, by written policy, would wait until the seventieth day to inform the customer.³² This delay, according to the OCC, diminished the consumer's opportunity to successfully prove the prior interest rate to Providian.³³ Additionally, the OCC alleged that after a consumer's account was initially transferred to Providian, the bank required an additional fee for funds to be moved to another bank.³⁴

The OCC also alleged that Providian telemarketers left out key disclosures when it marketed its credit protection program.³⁵ Under this program, customers paid \$156 annually for this coverage and, according to the OCC, were told that their monthly

currently paying on the balances you transfer." *Id.* If pressed again by the consumer, the telemarketer was directed to respond: "[w]ell, Mr./s _____, under our Guaranteed Saving Program, what we do is determine the true cost of what you are paying in interest and we beat it. That's why we've had such an overwhelming response to this account." *Id.* If pressed further, the script instructed the telemarketers to say: "[s]imply show us the regular, non-introductory rates you're paying for the balances you've transferred and we'll combine this information to get the actual cost you're paying in interest – and beat it! So, you have a variable rate that beats what you are paying now! (Sounds good, doesn't it!)" *Id.* at 1-2.

29. *Id.* at 2. The OCC claimed the telemarketers were instructed by Providian not to tell consumers that the maximum savings over the consumer's current rate was 0.7% in one rollout and 0.3% in another rollout, regardless of how persistently the consumer pressed the matter. *Id.*

30. *Id.* at 2.

31. Fact Sheet, *supra* note 25, at 2.

32. *Id.*

33. *Id.*

34. *Id.* Providian's "balance transfer fee" charged to move funds to another institution was 3% of the customer's account balance. *Id.*

35. *Id.* Providian marketed the credit protection program as a way to avoid having to make payments when unable to work or unemployed. *Id.*

balance credit card payments would be waived for up to eighteen months in the event of an accident, sickness, disability, hospitalization, or involuntary unemployment.³⁶ The OCC charged, however, that Providian failed to “adequately disclose” that the program’s benefits were only valid during months for which customers paid fees for the protection.³⁷ The OCC also claimed that customers were not adequately advised that benefits for involuntary unemployment were not applicable until three months of fees were paid to Providian.³⁸ Additionally, the Agency charged that Providian failed to adequately inform consumers that the benefits did not apply to customers who are self-employed.³⁹

The Agency also claimed that Providian engaged in objectionable marketing practices with respect to its “no annual fee” cards.⁴⁰ According to the OCC, Providian failed to adequately inform its customers that credit protection coverage (at an annual cost of \$156) was mandatory for “no annual fee” cards.⁴¹ In cases where customers complained about unexpected credit protection charges, bank representatives would inform them that the only alternative to paying for the credit protection was to pay

36. *Id.* at 2-3. Under the terms of the program, participating customers were charged no interest during that period, and no adverse credit reports were to be filed against the customer. *Id.* at 2.

37. Fact Sheet, *supra* note 25, at 2. The credit protection was limited to the months the customer paid for the coverage, even when less than the eighteen months touted by Providian’s telemarketers. *Id.*

38. *Id.* The credit protection program was also unavailable for cases of hospitalization, sickness or disability caused by a pre-existing condition unless the consumer had paid six months of premiums. Providian failed to disclose this restriction as well. *Id.*

39. *Id.* Additionally, the OCC alleged that Providian failed to disclose that credit protection could be denied to applicants in the following situations: if the consumer accessed credit from another credit card other than Providian’s card; if the consumer paid more than the minimum payment to another credit card account, besides Providian’s; if the consumer’s account was not current; and if the consumer’s account was over-limit. *Id.* at 2-3.

40. *Id.* at 3.

41. *Id.* In marketing its “no annual fee” cards, Providian did not adequately disclose that, although technically no annual fee was charged, consumers were required to subscribe to the bank’s credit protection program at a rate of \$156 per year. *Id.* See *supra* notes 35-39 and accompanying text. The fact that credit protection was mandatory for the “no annual fee” card was not disclosed on either the solicitation letters marketing the product or on the card’s application form. Rather, Providian indicated that credit protection coverage was included with the card. Fact Sheet, *supra* note 25, at 3.

an annual fee.⁴² The credit protection coverage fees were more expensive than the annual fees.⁴³ Thus, according to the OCC, “in order for the consumer to receive a card with no annual fee, the consumer had to pay for even more expensive credit protection.”⁴⁴

The OCC also alleged that Providian left out key disclosures when it marketed its “Real Check” program, an awards program for new Providian customers.⁴⁵ The Agency claimed that Providian failed to disclose adequately that consumers were not only required to transfer an outstanding credit card balance to Providian, but they also needed to transfer a certain minimum balance in order to get the full reward.⁴⁶

III. JUDICIAL HISTORY OF ENFORCEMENT OF THE FTC ACT

The OCC claimed that these and other practices related to the marketing and issuance of credit cards by Providian constituted unfair and deceptive trade practices under the FTC Act.⁴⁷ Section 5 of the Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”⁴⁸ In 1964, the Federal Trade Commission (FTC) issued a policy statement that clarified this provision by articulating a three-prong test for determining whether a practice is unfair or deceptive.⁴⁹ This three-prong test considers 1) whether a practice causes substantial injury to consumers, 2) violates established public policy, or 3) is immoral,

42. Fact Sheet, *supra* note 25, at 3.

43. *Id.*

44. *Id.*

45. *Id.* In one instance, the promised rewards were up to \$100; in another instance, they were up to \$200. *Id.*

46. *Id.* For example, in order to receive a \$200 reward, subscribing customers were required to transfer a minimum balance of \$10,000. *Id.*

47. *Providian National Bank Settles*, *supra* note 1, at 2022.

48. Section 5 of the Federal Trade Commission Act is codified at 15 U.S.C. § 45 (1994). 15 U.S.C. § 45(a)(1) provides in pertinent part, “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” *Id.*

49. Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (July 2, 1964) (to be codified at 16 C.F.R. pt. 408).

unethical, oppressive, or unscrupulous.⁵⁰ The FTC's test was approved by the Supreme Court in *Federal Trade Commission v. Sperry & Hutchinson Co.*⁵¹

According to the FTC, consumer injury is substantial when the harm involves monetary damage, is neither speculative nor trivial, the injury is not outweighed by the competitive benefits of the practice, and is not reasonably avoided by the consumer.⁵² The FTC has explained that the public policy prong is often used in unfair and deceptive trade practices cases as additional evidence to determine the extent of consumer injury.⁵³ The FTC has also stated that violation of an established public policy, in some circumstances, may be sufficient to validate agency action.⁵⁴ The unethical or unscrupulous conduct prong of the test has, since the *Sperry & Hutchinson* decision, been deemed duplicative.⁵⁵ As the FTC explained, "conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well."⁵⁶

The *Providian* case is not the first time a dispute has arisen over enforcement of the FTC Act's unfair and deceptive trade practices provision.⁵⁷ Due to the Act's broad definition of procedures deemed to be unfair or deceptive trade practices, litigants quickly began asserting private, federal causes of action

50. *Id.*

51. 405 U.S. 233, 244 (1972).

52. *United Companies Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 200 (D.Mass. 1998). See also Letter from the Federal Trade Commission to the Honorable Wendell H. Ford and the Honorable John C. Danforth (Dec. 17, 1980), reprinted in H.R. REP. No. 98-156, Pt. 1, at 34 (1983) [hereinafter FTC Letter].

53. *United Companies Lending Corp.*, 20 F. Supp. at 201. See also FTC Letter, *supra* note 52 at 38-40.

54. *United Companies Lending Corp.*, 20 F. Supp. at 201. See also Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7743 (Mar. 1, 1984) (to be codified at 16 C.F.R. pt. 444).

55. *United Companies Lending Corp.*, 20 F. Supp. at 201. See also *American Financial Services Assn. v. Federal Trade Comm'n*, 767 F.2d 957 (D.C. Cir. 1985); FTC Letter, *supra* note 52, at 40.

56. *United Companies Lending Corp.*, 20 F. Supp. at 201. Courts have noted that proof of actual deception is not required to establish a violation of the unfair and deceptive trade practices provision on the FTC Act. Misrepresentations are considered prohibited by the Act if they "possess a tendency to deceive." *Trans World Accounts, Inc. v. Federal Trade Comm'n*, 594 F.2d 212, 214 (9th Cir. 1979). See also *MacKenzie v. U. S.*, 423 U.S. 827 (1975).

57. *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926).

after the original adoption of the FTC Act in 1914.⁵⁸ Courts, however, have consistently rejected such claims.⁵⁹ Citing the Supreme Court, one district court, for example, stated that “it is well-settled that there is no private, federal claim for which this court can grant relief for violations of the Federal Trade Commission Act.”⁶⁰

Despite the limitation on private enforcement under the federal statute, many states make private causes of action available to injured parties under their unfair and deceptive trade practices provisions. North Carolina, for example, has adopted the substantive portions of the federal statute verbatim,⁶¹ but permits a private cause of action for unfair and deceptive trade practices.⁶² Other states provide a private cause of action as well, some expressly by statute,⁶³ and others by core interpretation where the statutory language is silent on the question.⁶⁴

Prior to the *Providian* case, and in light of the inability of individuals to file private causes of action based on the federal statute,⁶⁵ the FTC Act’s unfair and deceptive trade practices provision has been enforced against banks through the consumer complaint procedure.⁶⁶ Under this procedure, any consumer having a complaint about a State member bank⁶⁷ can submit the

58. *Summey v. Ford Motor Credit Co.*, 449 F. Supp. 132, 136 (D. S.C. 1976).

59. *Moore*, 270 U.S. at 597. *See also* *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

60. *Summey*, 449 F.Supp. at 135 (citing *Moore v. New York Cotton Exchange*, 270 U.S. 593, 597 (1926)).

61. North Carolina Unfair Trade Practices Act, N.C. GEN STAT. § 75-1.1 (1997). Section 75-1.1(a) states: “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” *Id.*

62. *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 47 (4th Cir. 1983). *See also* *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 715 (4th Cir. 1983) (explaining that NCUTPA confers a private right of action).

63. 815 ILL. COMP. STAT. ANN. 505/10a(a) (West 1993). The Illinois unfair and deceptive trade practices act provides that a private cause of action rests with “any person who suffers damage as a result of a violation of this Act committed by any other person.” *Id.*

64. *Browell v. State Farm Mutual Ins. Co.*, 757 F.Supp. 526, 531 (M.D. Pa. 1991).

65. *See supra* notes 58-60 and accompanying text.

66. 12 C.F.R. § 227.2 (2000).

67. For purposes of the consumer complaint procedure, “State member bank” is defined as “a bank that is chartered by a State and is a member of the Federal

complaint to the Federal Reserve System.⁶⁸ The Board of Governors of the Federal Reserve System, which has authority to take enforcement action over State member banks,⁶⁹ refers complaints involving national banks to the OCC to enforce compliance.⁷⁰ Any individual or group filing a complaint alleging unfair or deceptive trade practices should receive a substantive response within fifteen days.⁷¹ In cases where the OCC finds a national bank is engaging in unsafe or unsound practices, it may issue a cease-and-desist order against that bank.⁷² If the offending bank fails to comply with such an order, the OCC can seek enforcement of the order through the courts.⁷³

IV. DOES THE OCC HAVE THE AUTHORITY TO ENFORCE THE FTC ACT BY BRINGING AN ACTION?

The *Providian* case marks the first time the OCC has sought to enforce the FTC Act by bringing an action against a bank for unfair and deceptive trade practices.⁷⁴ The FTC Act declares that unfair or deceptive acts or practices affecting commerce are unlawful.⁷⁵ The provision of the Act listing those entities subject to enforcement, however, explicitly excludes banks and some other financial institutions from the FTC's scope of enforcement.⁷⁶

Reserve System." 12 C.F.R. § 227.1(c).

68. 12 C.F.R. § 227.2(a).

69. 12 C.F.R. § 227.11(c)(2). The Board of Governors of the Federal Reserve System also has authority over "branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under § 25 or § 25A of the Federal Reserve Act." *Id.*

70. 12 C.F.R. § 227.11(c)(1). This section gives enforcement authority to the OCC over "national banks, banks operating under the code of law for the District of Columbia, and federal branches and federal agencies of foreign banks." *Id.*

71. 12 C.F.R. § 227.2(b). The individual or group may receive an acknowledgement setting a reasonable time for a substantive response, rather than a substantive response in some cases. *Id.*

72. 12 U.S.C. § 1818(b)(1) (1994).

73. *Id.* § 1818(i)(1).

74. Heller, *supra* note 11, at 4.

75. 15 U.S.C. § 45(a)(1) (1994). This provision reads in full: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.*

76. 15 U.S.C. § 45(a)(2) (1994). This provision reads in full:

No provision for enforcement against banks existed until the 1975 addition of § 57a to the FTC Act.⁷⁷ This section addresses agency enforcement against unfair and deceptive trade practice violations committed by various financial institutions, including banks.⁷⁸ First, § 57a provides that the Board of Governors of the Federal Reserve System “shall prescribe regulations” in order to prevent unfair and deceptive trade practices with respect to banks, defining with specificity such practices and containing requirements prescribed for the purpose of their prevention.⁷⁹ Second, § 57a grants the OCC the power to enforce compliance with these regulations against national banks pursuant to § 8 of the Federal Deposit Insurance Act (FDIA).⁸⁰ This section explicitly

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3) [15 U.S.C. § 57a(f)(3)], Federal credit unions described in section 18(f)(4) [15 U.S.C. § 57a(f)(4)], common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to [the Federal Aviation Act of 1958], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. §§ 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Id.

77. 15 U.S.C. § 57a (1994).

78. *Id.* § 57a(f). This subsection applies to “banks, savings and loan institutions, or Federal credit unions.” *Id.*

79. *Id.* § 57a(f)(1). This paragraph specifies that the appropriate regulatory agency “shall prescribe regulations to carry out the purposes of this section, including regulations defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices.” *Id.* The Federal Home Loan Bank Board has the authority to prescribe regulations with respect to savings and loan institutions; and the National Credit Union Administration Board has the authority to prescribe such regulations with respect to Federal credit unions. *Id.* This paragraph states that the regulatory agencies specified in this subsection “shall establish a separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to such acts or practices by banks or savings and loan institutions” subject to its jurisdiction. *Id.*

80. *Id.* § 57a(f)(2). The portion of this paragraph relating to national banks states that:

[c]ompliance with regulations prescribed under this subsection shall be enforced under section 8 of the Federal Deposit Insurance Act [12 U.S.C. § 1818], in the case of national banks, banks

empowers the OCC to enforce regulations promulgated by the Federal Reserve Board only; it does not, by its plain language, grant the OCC authority to enforce violations of the FTC Act not encompassed by such regulations.⁸¹

In only one instance has the Federal Reserve Board enacted the type of unfair and deceptive trade practice regulations Congress instructed it to prescribe in § 57a.⁸² Regulation AA's Credit Practices Rule prohibits a narrowly defined list of activities deemed to be unfair and deceptive trade practices.⁸³ The regulation prohibits consumer credit contracts that include provisions that apply confessions of judgment, waivers of exemption, and certain assignments of wages and security interests in household goods to the agreement.⁸⁴ Regulation AA

operating under the code of law for the District of Columbia, and Federal branches and Federal agencies of foreign banks, by the division of consumer affairs established by the Office of the Comptroller of the Currency.

Id. The division of consumer affairs of the Board of Governors of the Federal Reserve System has the authority to enforce the regulations prescribed under this subsection against State banks that are members of the Federal Reserve System, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under 25 or 25(a) [25A] of the Federal Reserve Act [12 U.S.C. §§ 601 et seq. or §§ 601]. *Id.* § 57a(f)(2)(B). The division of consumer affairs of the FDIC has the authority to enforce the regulations prescribed under this subsection against non-member State banks and insured State branches of foreign banks. *Id.* § 57a(f)(2)(C).

81. *Id.* § 57a(f).

82. 12 C.F.R. § 227.11 (2000).

83. *Id.* §§ 227.11-15. The consumer complaint procedure for alleged violations of this regulation are outlined in 12 C.F.R. §§ 227.1-2. For a discussion of the consumer complaint procedure under Regulation AA, see *supra* notes 66-73 and accompanying text.

84. 12 C.F.R. § 227.13. This subsection states that "(i)t is an unfair act or practice for a bank to enter into a consumer credit obligation that contains, or to enforce in a consumer credit obligation purchased by the bank, any of the following provisions" (a) a confession of judgment, warrant of attorney, or other waiver of the right of the opportunity to be heard in the event of suit; (b) a waiver of exemption or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest in connection with the obligation; (c) an assignment of earnings, unless its terms allow revocation at the will of the debtor, it is a payment plan authorized by the consumer as a method of making payments which commences at the time of the transaction, or it applies only to earnings already earned at the time of the assignment; or (d) a nonpossessory security interest in household goods other than a purchase money security interest. *Id.*

additionally prohibits specified practices involving cosigners to credit contracts⁸⁵ and one specific form of late charge arising from a credit relationship.⁸⁶ Consistent with § 57a,⁸⁷ Regulation AA grants the authority to enforce compliance to the OCC in the case of national banks.⁸⁸

The OCC's allegations against Providian are based on violations of the FTC Act,⁸⁹ but do not fit within the narrow parameters of activities prohibited by Regulation AA.⁹⁰ The statutory language of the FTC Act explicitly authorizes the OCC to enforce the Act with regard to practices covered by regulations promulgated by the Federal Reserve Board.⁹¹ What is less clear is whether the OCC can enforce compliance with the FTC Act⁹² beyond the parameters of these regulations. The OCC derives its enforcement authority from the FDIA.⁹³ Section 1818 of the FDIA affords the OCC a wide range of enforcement options against national banks, including cease-and-desist orders,⁹⁴

85. *Id.* § 227.14. This section prohibits, in connection with the extension of credit to consumers, a bank from misrepresenting the nature or extent of cosigner liability, and obligating a cosigner unless the cosigner is informed prior to becoming obligated of the nature of the liability. *Id.* § 227.14(a). This section also requires that the bank provide a written "clear and conspicuous disclosure statement" to the cosigner separate from any other part of the agreement prior to the cosigner incurring obligation. *Id.* § 227.14(b). The disclosure statement must be substantially similar to the sample statement provided in the regulation. *Id.*

86. *Id.* § 227.15. This section prohibits a bank from collecting "any delinquency charge on a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period." 12 C.F.R. § 227.15(a) (2000).

87. 15 U.S.C. § 45 (1994).

88. 12 C.F.R. § 227.11(c)(1) (2000). The OCC has the authority to enforce compliance with Regulation AA "in the case of national banks, banks operating under the code of laws for the District of Columbia, and federal branches and federal agencies of foreign banks." *Id.*

89. See Fact Sheet, *supra* note 25. For a summary of the allegations against Providian, see *supra* notes 25-46 and accompanying text.

90. 12 C.F.R. §§ 227.13-15. For a discussion of the acts and practices prohibited by Regulation AA, see *supra* notes 83-86 and accompanying text.

91. 15 U.S.C. § 57a(f)(2) (1994). For a discussion of the Federal Reserve's Board duty to promulgate regulations applying to banks and the OCC's authority to enforce such regulations, see *supra* notes 77-81 and accompanying text.

92. 15 U.S.C. § 45.

93. 12 U.S.C. § 1818 (1994).

94. *Id.* § 1818(b)(1). The number of cease-and-desist orders issued by the OCC against banks has been steadily on the rise. *Special Supervision/Fraud and*

removal of directors,⁹⁵ and the power to require the offending bank to make restitution or provide reimbursement for losses caused by the inappropriate activity.⁹⁶ This Act does not limit the OCC's enforcement authority to practices covered by regulations.⁹⁷ The FDIA gives the OCC the power to prosecute violations of "law, rule or regulation."⁹⁸ This language supports the Agency's position that its authority under the FDIA expressly allows it to take action for any violation of law.⁹⁹ According to this reasoning, the OCC has the authority to enforce any provision of the FTC Act declaring a trade practice unlawful, even if it is not included in a regulation promulgated by the Federal Reserve Board.¹⁰⁰

The language in the FTC Act itself, however, indicates that a violation of the Act's unfair and deceptive trade practice provision is not enough to give the agency enforcement jurisdiction.¹⁰¹ A literal interpretation of the Act's language supports the position that the OCC's jurisdiction with regard to unfair and deceptive trade practices is limited to those acts prohibited specifically by regulation.¹⁰² The OCC's action against Provident, therefore, brings forth an apparent conflict over enforcement jurisdiction between the FTC Act¹⁰³ and the FDIA.¹⁰⁴

Because neither statute resolves the apparent conflict¹⁰⁵

Enforcement Activities, OCC QUARTERLY JOURNAL, Sept. 2000, at 22. In 1999, the OCC issued eleven cease-and-desist orders against banks. *Id.* The agency issued eight, five, and two cease-and-desist orders against banks in the years 1998, 1997, and 1996, respectively. *Id.* Five such orders were issued during the first two quarters of 2000. *Id.*

95. 12 U.S.C. § 1818(e)(1)(C)(ii).

96. *Id.* § 1818(b)(6)(A).

97. *See Id.* § 1818(b)(1).

98. *Id.*

99. Heller, *supra* note 11, at 4.

100. *See id.* *See supra* notes 93-99 and accompanying text.

101. *See* 15 U.S.C. § 45(a)(2) (1994). For a discussion of the exclusion of banks from the FTC Act enforcement provision, *see supra* notes 75-76 and accompanying text.

102. *See* 15 U.S.C. § 57a(f) (1994).

103. 15 U.S.C. § 45; 15 U.S.C. § 57a(f). For a discussion of the applicability of the FTC Act, *see supra* notes 75-81 and accompanying text.

104. 12 U.S.C. § 1818 (1994). For a discussion of the applicability of the Federal Deposit Insurance Act, *see supra* notes 93-98 and accompanying text.

105. 15 U.S.C. § 54; 15 U.S.C. § 57a(f); 12 U.S.C. § 1818.

and no other statute addresses the point, the question is whether the OCC may proceed with its cause of action when no rules governing the enforcement of the statute expressly permit it to do so. Thus, the question is one of statutory interpretation in the first instance. *Chevron v. National Resources Defense Council*, which was handed down by the Supreme Court in 1984, is the landmark case regarding agency interpretation of legislation.¹⁰⁶ The *Chevron* court established a two-part test that courts must employ when substantively reviewing administrative interpretation of statutes.¹⁰⁷ First, the reviewing court will ask “whether Congress has directly spoken to the precise question at issue.”¹⁰⁸ In cases where the intent of Congress is clear from the statutory language, agencies and reviewing courts “must give effect to the unambiguously expressed intent of Congress.”¹⁰⁹ Thus, in cases where Congress speaks directly to the point, the analysis ends there.¹¹⁰ If, however, “the court determines Congress has not directly addressed the precise question at issue,” the reviewing court proceeds to the second step of the test and asks “whether the agency’s answer is based on a permissible construction of the statute.”¹¹¹ The Court in *Chevron* held that “if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”¹¹²

Applying the *Chevron* holding to the *Providian* case, the statutory language in both the FTC Act¹¹³ and the FDIA¹¹⁴ must be considered. Both Acts address the issue of OCC enforcement against banks.¹¹⁵ Section 5(a)(2) of the FTC Act explicitly excludes banks from enforcement by the Federal Trade

106. 467 U.S. 837, *reh’g denied*, 468 U.S. 1227 (1984).

107. *Id.* at 842.

108. *Id.*

109. *Id.* at 843.

110. *Id.* at 842.

111. *Id.* at 843.

112. *Chevron v. Nat’l Res. Def. Council*, 467 U.S. 837, *reh’g denied*, 468 U.S. 1227 (1984).

113. 15 U.S.C. § 45 (1994); 15 U.S.C. § 57a(f) (1994).

114. 12 U.S.C. § 1818 (1994).

115. 15 U.S.C. § 45(a)(2); 15 U.S.C. § 57a(f)(2); 12 U.S.C. § 1818(b)(1).

Commission.¹¹⁶ However, § 18(f) of the FTC Act grants enforcement authority to the OCC against banks.¹¹⁷ Yet, that power is limited to the enforcement of regulations prescribed by the Federal Reserve Board.¹¹⁸ The FDIA, on the contrary, grants broad enforcement authority to the OCC over national banks for violation of “a law, rule, or regulation.”¹¹⁹ No additional language in the FTC Act, the FDIA, or any additional statute resolves the ambiguity created by the conflict between the two Acts.¹²⁰ In cases where Congress has not spoken clearly on the question, *Chevron* directs reviewing courts to give deference to the agency’s interpretation.¹²¹

Since the *Chevron* decision, however, some debate has arisen over the degree of deference given to the agency in cases where the agency’s jurisdiction is at issue.¹²² In a post-*Chevron* dissenting opinion, Justice Brennan argued that *Chevron* does not apply if “the statute is designed to confine the scope of the agency’s jurisdiction to the areas Congress intended it to occupy.”¹²³ Justice Scalia responded by insisting that “it is settled law that the rule of deference applies even to an agency’s interpretation of its own statutory authority or jurisdiction.”¹²⁴ Post-*Chevron* rulings by the Supreme Court support Justice Scalia’s view, even in cases where an agency interprets its enabling legislation to expand the agency’s jurisdiction.¹²⁵ Justice White, citing *Chevron* for a unanimous Court, held that when addressing “a problem of defining the bounds of [an agency’s] regulatory authority,” the Court’s review is limited to the question of whether

116. 15 U.S.C. § 45(a)(2).

117. 15 U.S.C. § 57a(f)(2).

118. *Id.* § 57a(f)(1).

119. 12 U.S.C. § 1818(b)(1).

120. 15 U.S.C. § 45(a) (1994); 15 U.S.C. § 57a(f) (1994); 12 U.S.C. § 1818 (1994).

121. *Chevron v. National Resources Defense Counsel*, 467 U.S. 837, 843-44 (1984).

122. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

123. *Id.* at 386 (Brennan, J., dissenting).

124. *Id.* at 381 (Scalia, J., concurring).

125. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 845-86 (1986). See also *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221 (1986); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

the agency's interpretation is reasonable.¹²⁶

The *Chevron* court noted that in order to sustain an agency's interpretation of a statute, a court need not conclude that the agency's construction was the only one it could have adopted or even that it is the interpretation the court would have reached if the question initially had arisen in a judicial proceeding.¹²⁷ Donald T. Hornstein, an administrative law expert, notes that Congress's intent, based on the conflicting applicable statutes in this case, is unclear.¹²⁸ Deference, therefore, should be given to the OCC's construction.¹²⁹

Lawyers in the field recognize that the result of a challenge to the OCC's action in this case is uncertain. Molly A. Meegan of Skadden, Arps, Slate, Meagher & Flom in Washington, D.C. acknowledges this uncertainty, noting that she "would not have been surprised had a judge said the OCC did not have the jurisdiction" to enforce the FTC Act as attempted in *Providian*.¹³⁰

Recognizing that there is "a reasonable chance that the outcome could have gone either way" had the OCC's position been challenged, Eugene M. Katz of Womble, Carlyle, Sandridge & Rice in Charlotte, a former litigation attorney for the OCC, states that it was a reasonable interpretation of its jurisdiction for the OCC to order the bank to cease and desist a violation of law.¹³¹ In reaching his conclusion, Mr. Katz acknowledges the tension between the substantive and jurisdictional statutory provisions involved.¹³² Mr. Katz believes that, due to inaction by the Federal Reserve Board in passing regulations, the OCC likely believed it was justified in taking an aggressive stance in order to enforce a

126. *Riverside*, 474 U.S. at 131-32.

127. *Chevron v. National Resources Defense Counsel*, 467 U.S. 837, 843 n. 11 (1984).

128. Interview with Donald Thomas Hornstein, Reef Ivey II Research Professor of Law, School of Law, University of North Carolina at Chapel Hill, in Chapel Hill, N.C. (Jan. 17, 2001) [hereinafter Hornstein interview].

129. *Id.*

130. Interview with Molly A. Meegan, a senior litigator in the consumer financial services enforcement and litigation practice at Skadden, Arps, Slate, Meagher & Flom, L.L.P., in Washington, D.C. (Jan. 4, 2001) [hereinafter Meegan interview].

131. Interview with Eugene Katz, Member, Womble, Carlyle, Sandridge & Rice, PLLC, in Charlotte, N.C. (Jan. 4, 2001) [hereinafter Katz interview].

132. *Id.*

substantive provision on the FTC Act.¹³³ He notes that the Agency's action in this case could be compared to the OCC ordering a bank to cease and desist violation of tax codes, even though the Internal Revenue Service has primary jurisdiction over tax law enforcement.¹³⁴ Despite the lack of explicit jurisdictional enforcement authority in the statute, Mr. Katz believes that it is a plausible reading of the OCC's enforcement authority for the agency to assert that it is justified in enforcing these laws in both cases.¹³⁵ Mr. Katz observes that the FTC Act does not say that it is unenforceable against banks; it provides, rather, that it is not enforceable by the FTC.¹³⁶

V. BENEFITS AND CONSEQUENCES OF OCC'S ABILITY TO BRING UNFAIR AND DECEPTIVE TRADE PRACTICES ACTIONS

The benefits and repercussions of the OCC's action against Providian in this case will likely be limited by the fact that Providian is a unique kind of entity.¹³⁷ Mr. Katz notes that Providian occupies a relatively small universe of banks that focus almost entirely on credit card business and take an extremely aggressive marketing approach to promote that business.¹³⁸ The most obvious benefit of the agency's action is increased consumer protection.¹³⁹ Banks with credit card programs will be forced to carefully examine their practices relating to that portion of their business after seeing the high costs associated with violating unfair and deceptive trade practice provisions.¹⁴⁰ The *Providian* settlement should encourage credit card issuers to consider carefully the extent and method of disclosure when establishing marketing procedures.¹⁴¹ Specifically, issuers should devote

133. 15 U.S.C. § 45 (1994); Katz interview, *supra* note 131.

134. Katz interview, *supra* note 131.

135. *Id.*

136. 15 U.S.C. § 45(a)(2); Katz interview, *supra* note 131.

137. Katz interview, *supra* note 131.

138. *Id.*

139. Meegan interview, *supra* note 130.

140. Katz interview, *supra* note 131.

141. Andrew L. Sandler & Molly L. Meegan, *Credit Card Issuers Beware: Consumer Disclosure Issues Present the Next Regulatory and Enforcement Risk For*

special care when formulating a credit insurance program or any other fee-based product ancillary to the credit card itself, promotional activities, including balance transfer and no annual fee programs, cash advance and negotiable check practices, and account management practices.¹⁴² Following the successful enforcement of the FTC Act, the OCC may now additionally seek to enforce other federal laws not specifically within the agency's enforcement jurisdiction, such as an environmental or historic preservation law.¹⁴³

If the OCC's enforcement of the FTC Act remains unchallenged, other regulatory agencies may also seek to exercise this power. The same statute that gives the OCC enforcement authority over national banks¹⁴⁴ also grants the Federal Reserve Board and the FDIC the same authority over state member banks¹⁴⁵ and state nonmember banks,¹⁴⁶ respectively. According to Mr. Katz, the OCC's theory that it has the authority to enforce FTC Act provisions is equally applicable to other regulatory agencies that have cease and desist enforcement authority under § 1818 of the Federal Deposit Insurance Act.¹⁴⁷ Mr. Katz observes that the OCC is typically more aggressive than either the Federal Reserve Board or the FDIC in pursuing new regulatory initiatives, and is not surprised that the OCC was first to attempt direct enforcement of the FTC Act.¹⁴⁸ He notes, however, that the more conservative regulatory agencies may utilize this enforcement measure in the future.¹⁴⁹

Unintended consequences could result from the extension of the OCC's power demonstrated in the *Providian* case as well. One such consequence could be national banks seeking a different charter.¹⁵⁰ Karen Shaw Petrou of ISD/Shaw, a consulting firm in

the Industry, 117 BANKING L.J. 329, 334 (2000).

142. *Id.* at 335.

143. Katz interview, *supra* note 131.

144. 15 U.S.C. § 57a(f)(2)(A) (1994).

145. *Id.* § 57a(f)(2)(B).

146. *Id.* § 57a(f)(2)(C).

147. Katz interview, *supra* note 131.

148. *Id.*

149. *Id.*

150. *Providian National Bank Settles*, *supra* note 1.

Washington, D.C., noted that, in the past, national banks have reacted to significant OCC enforcement by seeking different charters.¹⁵¹ Since national credit card banks such as Providian depend on federal authority to set uniform nationwide rates, this may not have been an option for credit card banks in the past.¹⁵² Petrou, however, believes that the OCC's new enforcement stance is a "pretty heavy price to pay for that kind of benefit."¹⁵³ Mr. Katz, however, does not believe that aggressive consumer protection initiatives are likely to cause national banks to switch charters.¹⁵⁴ He notes that no regulatory agency will allow another to provide significantly more consumer protection without taking steps to match it.¹⁵⁵ Neither the Federal Reserve Board nor the FDIC is likely to allow a bank to by-pass consumer protection measures by switching bank charters.¹⁵⁶

Another possible consequence could be that banks become discouraged from issuing as much credit to consumers.¹⁵⁷ Ms. Meegan notes that the credit card industry is already an extremely competitive business.¹⁵⁸ If increased consumer protection initiatives cause the industry to be less lucrative, banks may elect to issue less credit and pursue profits in other areas.¹⁵⁹

VI. CONCLUSION

The OCC's action in this case represents the first enforcement of the FTC Act's unfair and deceptive trade practices provision by a bank regulatory agency.¹⁶⁰ In reaching its decision to pursue this initiative, the OCC likely recognized that it was in a position to benefit regardless of whether Providian elected to challenge the agency's action.¹⁶¹ If Providian agreed to settle, as it

151. *Id.*

152. *Id.*

153. *Id.* at 2022-23.

154. Katz interview, *supra* note 131.

155. *Id.*

156. *Id.*

157. Meegan interview, *supra* note 130.

158. *Id.*

159. *Id.*

160. Heller, *supra* note 11, at 4.

161. Katz interview, *supra* note 131.

did in this case, the OCC successfully enforced the FTC Act against an offending bank.¹⁶² Conversely, a challenge by Providian to the OCC's authority to enforce this act would have drawn attention to the Federal Reserve Board's inaction with respect to prescribing regulations and added pressure to the Board to promulgate additional unfair and deceptive trade practice regulations.¹⁶³

The long-term effects of the OCC's action in this case may depend on whether the agency continues to exercise this new enforcement initiative. The OCC, although successful in this action against Providian, may take a less aggressive enforcement stance in President George W. Bush's administration.¹⁶⁴ The new Republican administration may, therefore, be less likely to pursue enforcement options such as the one used here against Providian.¹⁶⁵

Aside from the implications of the OCC's action in this matter, the most intriguing issue with regard to the *Providian* case is whether the agency was acting within its authority when enforcing the FTC Act. This most controversial question would have been no issue at all had the Federal Reserve Board prescribed regulations covering the activities in which Providian allegedly engaged.¹⁶⁶ The Federal Reserve Board's inaction left the OCC with the choice of either allowing unfair and deceptive trade practices beyond the scope of prescribed regulations¹⁶⁷ to continue or seeking to enforce the FTC Act¹⁶⁸ irrespective of the lack of regulations.

Ultimately, the OCC answered this question through its action against Providian, relying on the FDIA¹⁶⁹ to provide the agency the necessary jurisdiction despite contrary language in the

162. *Id.*

163. *Id.*

164. Meegan interview, *supra* note 130.

165. *Id.*

166. 15 U.S.C. § 57a(f)(2)(A) (1994).

167. 12 C.F.R. §§ 227.13-15 (2000). For a discussion of the acts and practices prohibited by Regulation AA, see *supra* notes 83-86 and accompanying text.

168. 15 U.S.C. § 54(a) (1994).

169. 12 U.S.C. § 1818(b)(1) (1994).

FTC Act itself.¹⁷⁰ Under the Supreme Court's ruling in *Chevron*, still the controlling case on agency statutory interpretation,¹⁷¹ deference should be given to the OCC's reasonable judgment in absence of clear congressional intent to the contrary.¹⁷² The power of an agency to interpret legislation to enlarge its jurisdiction caused Robert A. Anthony to question "whether *Chevron* will enduringly displace the deep-rooted doctrine than an 'agency may not finally decide the limit of its statutory power.'"¹⁷³ Until the Supreme Court revisits its decision in *Chevron*,¹⁷⁴ however, the OCC's action against Providian in this case will remain permissible.

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170. 15 U.S.C. § 45(a)(2) (1994); 15 U.S.C. § 57a(f)(2)(1994).

171. Hornstein interview, *supra* note 128.

172. *Chevron v. National Resources Defense Counsel*, 467 U.S. 837, 843-44 (1984).

173. Robert A. Anthony, *Which Agency Interpretation Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 54 (1990) (quoting *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946)).

174. 467 U.S. 837 (1984).